

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

NANCY J. SCHISSLER
Claimant

VS.

DILLON COMPANIES, INC.
Respondent
Self-Insured

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Docket No. 166,904

ORDER

Claimant requests review of the Award entered by Administrative Law Judge George R. Robertson dated June 29, 1994.

APPEARANCES

Claimant appeared by her attorney, James S. Oswalt of Hutchinson, Kansas. The respondent, a self-insured, appeared by its attorney, John F. Hayes of Hutchinson, Kansas.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the stipulations of the parties are set forth in the Award.

ISSUES

The Administrative Law Judge found that claimant did not prove that she sustained personal injury by accident arising out of and in the course of her employment with the respondent and, therefore, denied claimant's request for benefits. Claimant requested this review and asks the Appeals Board to review that finding. That is the sole issue now before this Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds:

The Award of the Administrative Law Judge should be affirmed.

Claimant alleges that during the entire period she worked for the respondent, September 1988 through February 11, 1992, she sustained a series of repetitive injuries to her low back that ultimately resulted in lumbar disc herniation. Claimant began working for the respondent in September 1988 as a grocery sacker and carryout. Several months later she moved to the checker and cashier position where she removed groceries from the cart, scanned and sacked grocery items, took money from the customers and sometimes took the groceries to the customers' cars. Individual items weighed up to forty (40) pounds and individual sacks of groceries weighed between five (5) and twenty (20) pounds. Claimant testified her job required her to "continuously" twist, bend, and lift.

From February 2 through 7, 1992 claimant and her husband vacationed in Colorado. On February 9, two days after returning from Colorado but before returning to work, claimant experienced back spasm and right leg pain and numbness. Claimant testified her pain was the same type and in the same area that she had previously experienced symptoms, but on this occasion they were much more severe. Although symptomatic, claimant returned to work on February 10 for two days before leaving due to her back complaints. After initially seeing her chiropractor and personal physician, in March 1992 claimant underwent lumbar disc surgery.

Claimant presented the testimony of her chiropractor, Dr. Hedman. In February 1989 claimant began having lower back pain with pain into the left leg. As a result, she began seeing Dr. David A. Hedman whom she continued to see for a period of three (3) years. When she first saw the doctor, claimant indicated she had experienced intermittent low back pain for years, along with pain in the left hip and left leg to the ankle and tingling in her toes. During the three (3) years he treated claimant, her primary complaint was low back pain which occasionally radiated into the legs. At various appointments, claimant specifically related her work activities to her complaints. The records attached to Dr. Hedman's deposition indicate he saw claimant approximately thirty-five (35) times in 1989, sixteen (16) times in 1990, and twenty-two (22) times in 1991 for low back complaints, for a total of seventy-three (73) visits before her February 9, 1992 episode of increased symptomatology.

Dr. Hedman testified he saw claimant on February 10, 1992 and claimant told him she was having a flare-up of low back pain and pain into the right leg. She also told the doctor she had recently traveled to Colorado and her symptoms worsened as time progressed. The doctor noted claimant's pain was more severe on this occasion and his treatment did not seem to help as it had in the past. The doctor believes claimant's complaints during the period of his treatment, February 1989 through February 14, 1992, were related to her work activities and she has sustained a five percent (5%) functional impairment, according to the AMA Guides. The doctor believes claimant's work contributed to her lumbar disc problem.

Michael R. Wesley, M.D., claimant's personal physician, also testified on behalf of claimant. Dr. Wesley is board certified in family practice and maintains his practice at the Hutchinson Clinic. His notes indicate he saw claimant in February 1989, when she reported discomfort in her low back with pain radiating from her back into the posterior of her left leg. At that time, claimant told the doctor she had a congenital back defect that had given her problems off and on for a number of years. Three (3) years later, on February 13, 1992, Dr. Wesley again saw claimant. At that visit claimant indicated she had pain in her right buttock and down the back of her right leg. She told the doctor she rode eight (8) hours or so in a car on a return trip from Colorado the day before her back and leg began

bothering her. When she did not respond to various treatments and after reviewing an MRI taken on February 17 indicating a large disc herniation between the fourth and fifth lumbar vertebra, Dr. Wesley referred claimant to Dr. Paul S. Stein, a neurosurgeon in Wichita.

Because disc herniations may occur in a progressive fashion over an extended period and because x-rays taken in February 1989 did not show narrowing of the L4-5 disc space, Dr. Wesley believes the lumbar disc herniation occurred sometime between the February 1989 x-ray and the February 1992 MRI. The doctor also testified that he doubts the disc herniation was caused by claimant's travel from Colorado, and believes it is much more reasonable to him that claimant's more strenuous activity at work, such as bending and picking up items, "contributed most greatly to her problem". Although Dr. Wesley did not have an opinion regarding claimant's functional impairment rating, he agreed that Dr. Stein's restrictions were reasonable.

Claimant presented the testimony of board-certified neurosurgeon Paul S. Stein, M.D. Dr. Stein first saw claimant on February 27, 1992. Claimant told Dr. Stein that she began experiencing pain in her back when she was returning from her Colorado vacation. After a period of conservative treatment, on March 31, 1992, Dr. Stein performed a discectomy at the L4-5 intervertebral space. The doctor believes claimant has a fifteen percent (15%) functional impairment rating to the body as a whole due to the disc herniation and subsequent back surgery. He also believes claimant should observe the following work restrictions and limitations: she should not stand in one area for more than twenty to thirty (20-30) minutes, she should not bend more than thirty or forty (30-40) degrees, and she should not lift more than forty (40) pounds. Because he does not believe she could stand in one position long enough, the doctor believes claimant is completely disabled from performing her former job as a grocery checker. Dr. Stein is unable to relate claimant's disc herniation to her work because he does not have a history of a specific precipitating event and numerous activities may cause a disc to rupture such as sneezing, turning over in bed, or bending to tie one's shoe.

Based upon the above evidence, the Administrative Law Judge denied claimant's request for benefits. The Appeals Board agrees with that conclusion. Although claimant alleged a series of back injuries, the evidence fails to establish it is more probably true than not that claimant's disc herniation was related to her work activities with respondent. Although Drs. Hedman and Wesley testified they felt claimant's work somehow contributed to her back problems, neither doctor explained how the work contributed to the herniation or why claimant's symptoms did not flare up until she returned from her Colorado vacation when she had not worked for over a week. Likewise, the evidence does not establish whether the "contribution" was in the nature of a temporary exacerbation of symptomatology or repetitive mini-traumas to the disc or its supporting structures. A close reading of the doctors' testimony fails to establish that claimant sustained repetitive micro-traumas while working for respondent that eventually led to the disc herniation. More is required than mere allegation that someone's work contributed to their injury. Although claimant testified she continuously bended, twisted, and lifted in her job with respondent, the record is devoid of evidence regarding the number of times per hour or per day claimant would be required to perform those physical movements and devoid of evidence how far claimant would be required to bend or the extent she would be required to twist. Based upon the entire record, the Appeals Board finds claimant has failed to satisfy her burden of proof.

Claimant bears the burden of proof to establish her claim. "Burden of proof" is defined in K.S.A. 44-508(g) as:

"[T]he burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is:

"[O]n the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record." K.S.A. 44-501(a).

The Appeals Board adopts the findings and conclusions of the Administrative Law Judge that are not inconsistent with those set forth herein.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by the Administrative Law Judge George R. Robertson dated June 29, 1994 should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of January 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James S. Oswalt, Hutchinson, Kansas
John F. Hayes, Hutchinson, Kansas
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director